

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

BETHLEHEM CONSTRUCTION, INC., a  
Washington corporation,

Plaintiff,

v.

TRANSPORTATION INSURANCE COMPANY,  
a foreign corporation,

Defendant.

NO. CV-03-0324-EFS

**ORDER DENYING TRANSPORTATION'S  
PUNITIVE DAMAGES MOTION**

Before the Court is Transportation Insurance Company's ("Transportation's") Motion for Partial Summary Judgment on the Non-recoverability of Punitive Damages Against Transportation Insurance Company Under California Law (Ct. Rec. 163). The Court has reviewed the memoranda filed by the parties, listened to the arguments of counsel and now DENIES the motion for the reasons that follow.

**I. Applicable Law**

In Court Record 530 the Court ruled that California law applied to the issue of the recovery of punitive damages. The pertinent California statute states:

1                     (a) In an action for the breach of an obligation not arising  
 2 from contract, where it is proven by *clear and convincing*  
 3 evidence that the defendant *has been guilty of oppression,*  
*fraud, or malice*, the plaintiff, in addition to the actual  
 4 damages, may recover damages for the sake of example and by way  
 5 of punishing the defendant.

6                     ...

7                     (c) As used in this section, the following definitions shall  
 8 apply:

9                         (1) "Malice" means conduct which is intended by the defendant  
 10 to cause injury to the plaintiff or *despicable conduct which*  
 11 *is carried on by the defendant with a willful and conscious*  
*disregard of the rights or safety of others.*

12                         (2) "Oppression" means *despicable conduct that subjects a*  
 13 *person to cruel and unjust hardship in conscious disregard of*  
 14 *that person's rights.*

15                         (3) "Fraud" means an intentional misrepresentation, deceit, or  
 16 concealment of a material fact known to the defendant with the  
 17 intention on the part of the defendant of thereby depriving a  
 18 person of property or legal rights or otherwise causing injury.

19                     Cal. Civ. Code § 3294(a) and (c) (emphasis added).

## II. Standard of Review

20                     Summary judgment will be granted if the "pleadings, depositions,  
 21 answers to interrogatories, and admissions on file, together with the  
 22 affidavits, if any, show that there is no genuine issue as to any  
 23 material fact and that the moving party is entitled to judgment as a  
 24 matter of law." FED. R. CIV. P. 56(c). When considering a motion for  
 25 summary judgment, a court may not weigh the evidence nor assess  
 26 credibility; instead, "the evidence of the non-movant is to be believed,  
 and all justifiable inferences are to be drawn in his favor." *Anderson*  
*v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A genuine issue for  
 trial exists only if "the evidence is such that a reasonable jury could  
 return a verdict" for the party opposing summary judgment. *Id.* at 248.  
 In other words, issues of fact are not material and do not preclude  
 summary judgment unless they "might affect the outcome of the suit under

the governing law." *Id.* There is no genuine issue for trial if the evidence favoring the non-movant is "merely colorable" or "not significantly probative." *Id.* at 249.

If the party requesting summary judgment demonstrates the absence of a genuine material fact, the party opposing summary judgment "may not rest upon the mere allegations or denials of his pleading, but . . . must set forth specific facts showing that there is a genuine issue for trial" or judgment may be granted as a matter of law. *Anderson*, 477 U.S. at 248. This requires the party opposing summary judgment to present or identify in the record evidence sufficient to establish the existence of any challenged element that is essential to that party's case and for which that party will bear the burden of proof at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). Failure to contradict the moving party's facts with counter affidavits or other responsive materials may result in the entry of summary judgment if the party requesting summary judgment is otherwise entitled to judgment as a matter of law. *Anderson v. Angelone*, 86 F.3d 932, 934 (9th Cir. 1996).

### **III. Analysis and Conclusion**

In support of its motion, Transportation argues that there were no facts demonstrating clear and convincing evidence of Transportation's conduct meeting the statutory standard for punitive damages either in Bethlehem Construction Inc.'s ("Bethlehem's") answers to specific interrogatories requesting that information or in the Federal Rule of Civil Procedure 26(a)(2)(B) report of Mr. Casselman, Bethlehem's expert on this issue, or in his deposition quoting the pertinent answers and attaching documents. In response, Bethlehem submitted declarations and

1 attachments in an effort to carry its *Celotex* burden. The Court has  
2 carefully reviewed the material submitted by both parties. Viewing  
3 factual material and the reasonable inferences therefrom in a light most  
4 favorable to Bethlehem, the Court concludes that Bethlehem has met its  
5 *Celotex* burden and that there is a genuine issue of material fact as to  
6 whether the conduct of Transportation meets the California statutory  
7 standard for an award of punitive damages.

8 The Court notes that Bethlehem's interrogatory answers were  
9 awkwardly phrased and by themselves may not have been enough to meet the  
10 *Celotex* burden. However, Mr. Casselman's Rule 26(a)(2)(B) report and his  
11 deposition testimony pointedly discussed the conduct of Transportation  
12 from which a jury could conclude that there was clear and convincing  
13 evidence it acted in conscious disregard of the rights of Bethlehem under  
14 the insurance policies in effect. Together with the declaration of Mr.  
15 Addleman, who interacted with Transportation representatives and lawyers  
16 for Steveco, and the declaration of Mr. McCormick, a percipient witness  
17 to discussions with both Transportation representatives and the lawyers  
18 for Steveco and the attachments thereto, the Court concludes that there  
19 are genuine issues of material fact which require the denial of this  
20 motion.

21 As to Transportation's shotgun evidentiary objections to Bethlehem's  
22 declarations and attachments thereto in Transportation's reply, they are  
23 overruled.

24 Accordingly, **IT IS HEREBY ORDERED:** Transportation's Motion for  
25 Partial Summary Judgment on the Non-recoverability of Punitive Damages  
26 Against Transportation Under California Law (**Ct. Rec. 163**) is **DENIED**.

**IT IS SO ORDERED.** The District Court Executive is directed to enter this Order and provide a copy to counsel.

**DATED** this 9<sup>th</sup> day of March 2007.

S/ Edward F. Shea  
EDWARD F. SHEA  
United States District Judge

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